No. 15,948

IN THE

United States Court of Appeals

For the Ninth Circuit

VERNON CHAPPELL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

On April 1, 1957, the Grand Jury filed in the District Court for the District of Alaska, Third Judicial Division, an indictment charging the appellant with violations of section 641 Title 18 U.S.C. The indictment contained six counts. The jury returned a verdict of guilty as to Counts 1 and 5 only.

The District Court had jurisdiction of the indictment and the trial by virtue of the provisions of sections 53-1-1, 53-2-1 and 66-3-1 of the Alaska Compiled Laws Annotated 1949, and Title 48 U.S.C. section 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of the provisions of sections 1291 and 1294, chapter 83 Title 25 U.S.C. and section 14 of Public Law 85-508, 72 Stat. 339.

STATEMENT OF FACT.

The appellant was at the time of the offenses involved in this case a Master Sergeant in the United States Air Force assigned to the Headquarters Squadron Section, Alaskan Air Command, Elmendorf Air Force Base, Alaska. The appellant was assigned as Mess Steward of the Headquarters Squadron, Alaskan Air Command at the time he committed the offenses involved in the Counts I and V of the Indictment (R. 916, 917). As to Count I of the Indictment of which the appellant was convicted, the appellee called witnesses, Houston, Messer, Hopper, Sanders, Dugdale, Jones and Palmer. It was proved that for a period of about three weeks from August to September 1956, that an Airman Cline, who was under the supervision of the appellant, worked for the appellant during his normal duty hours. Cline painted several apartments owned by the appellant in Mountain View, Alaska. The overwhelming weight of the evidence proved that Cline performed none of his military duties during the period he was working for the appellant (R. 268, 271, 471, 478 et seq., 638 et seq., 642 et seq., 646, 751 et seq.). The appellant put Cline on sick call to cover the time on one day so he could work

for the appellant on duty hours. Cline did go on sick call and worked for Chappell instead (R. 755). Evidence was presented that the appellant attempted to have the witness Cline change his version of what happened after Cline had testified before the Grand Jury (R. 762). Appellant took the stand in his own behalf and admitted that Cline had worked for him, but denied ever knowingly working Cline on Government time even though he was the Non-Commissioned Officer in charge of Cline and took no action against him when he was absent from his duties for three weeks (R. 968).

As to Count V of the Indictment, of which the appellant was convicted, the appellee called as principal witnesses, Houston, Sanders, Hooper, Wilson, Stone, Palmer, Christianson, and Woods. The evidence demonstrated that the appellant had the furniture set out in Count V of the Indictment and that this furniture was of an unauthorized type for offbase use (R. 722). There was no evidence except the appellant's testimony that the furniture was lawfully issued to him. The appellee dismissed Count VI of the Indictment (R. 865). The jury acquitted the appellant of Counts II, III, and IV (R. 52) and convicted him of Counts I and V (R. 53).

Appellant demanded certain summaries of the testimony of witnesses Ferguson and Houston made by the prosecuting attorney for his use at the appellant's trial under the ruling in the *Jencks* case. The trial Judge ordered all O. S. I. and F. B. I. reports to be turned over but refused to allow the summaries,

made by the prosecuting attorney, to be produced in the respective cases (R. 109-113, 195, 217, 226).

Judgment was duly signed (R. 60, 61). From that judgment the appellant appealed to this Court (R. 63 et seq.).

ARGUMENT.

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO REQUIRE THE WORK NOTES OF THE PROSECUTING ATTORNEY TO BE PRODUCED ON MOTION OF THE APPELLANT.

In his brief, the appellant attempts to stretch the decision of the Supreme Court in *Jencks v. United States,* 353 U.S. 657 (1957) to require memoranda prepared by the prosecuting attorney after an interview with a witness prior to trial to be produced. The appellant does not cite any authorities covering a factual situation similar to the case at bar. In the case of *Jencks v. United States, supra,* the court faced the problem of a defendant's right in a criminal trial to have access of reports submitted to the F. B. I. by government witnesses. *Jencks* was convicted of filing a false non-communist affidavit. Two witnesses who testified concerning his alleged communist activities revealed that they had submitted to the F. B. I. contemporaneous reports of their investigations covering the matters as to which they testified. The defendant demanded that these reports be produced for the judge's inspection and, if any inconsistency appeared between the documents and the testimony of their authors, that they be turned over to the defendant

for use in cross-examination. The defendant's request was denied on the ground that no showing of inconsistency between the reports and the testimony had been made. The Supreme Court reversed, holding that a prior showing of inconsistency was unnecessary and that the reports must be given directly to the defendant without any prior screening by the judge. Two concurring Justices disagreed with the majority on the latter point and Mr. Justice Clark dissented.

The record in this case reveals that the statements and summaries given to the F. B. I. and O. S. I. by the witnesses, were freely turned over to the appellant in accordance with the ruling in the *Jencks* case. What is now complained of is the failure of the prosecutor to turn over his work product, prepared by the prosecutor for his use in the prosecution of the case. The memoranda desired by the appellant were made shortly before trial and after indictment in the prosecuting attorney's office. It is obvious from the evidence that the prosecuting attorney was merely preparing himself for the conduct of the trial, and the result of his efforts, was the work product of the prosecutor. The trial court refused to extend the *Jencks* decision to encompass the factual situation in this case. The court stated in substance that he did not feel that the Jencks ruling allowed a criminal defendant to peruse the files of the counsel for the government.

Under the Federal Rules of Civil Procedure, the discovery rules are very broad indeed and are given liberal application by the courts. On the other hand,

discovery in the Federal System is a rather limited and restricted right in the hands of a criminal defendant. In the landmark case of *Hickman v. Taylor,* 329 U. S. 495 (1947), Mr. Justice Murphy, speaking for the majority of the court, stated at page 510-512:

> "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be de-

moralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition discovery portions of the Federal Fules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted."

The rationale of the Supreme Court in the case of *Hickman v. Taylor* would apply with greater force to the instant case. The fact that *Hickman v. Taylor*

was decided under the Civil Rules would not be material here. The definition of work product in the *Hickman* case would apply with considerable force to the facts of this case. It is clear that what the appellant was trying to do was to obtain the work product of the prosecuting attorney. The *Jencks* case should not be construed to apply to a situation such as this. No case is cited by the appellant which would allow discovery under these circumstances.

This Court in the case of *Harris v. United States* (No. 619, Nov. 6, 1958), stated that a clear violation of the *Jencks* statute was not prejudicial error when the conviction was supported by overwhelming evidence other than that furnished by the witness's testimony. In this connection, even if this Court decides to extend the *Jencks* rule to the situation here involved, it is the contention of the appellee that such error would be harmless for the reason that the conviction of the appellant is supported by overwhelming evidence from other witnesses. The record will reflect that the court was exceedingly liberal in making available to the appellant, statements made by the witnesses to the F. B. I. prior to trial. In any event, any error relating to the memoranda prepared by the prosecutor concerning the witness Ferguson's proposed testimony would be harmless error. His testimony related to no counts of the indictment of which the appellant was convicted.

There is no showing on the part of the appellant that the deletions made by the prosecuting attorney of certain reports was prejudicial to the substantial

rights of the appellant. On the other hand, the record reveals that the rule enunciated in the *Jencks* case, *supra,* was followed by the trial court.

II. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY AS TO THE MEANING OF CRIMINAL INTENT. THE COURT DID NOT ERR IN REFUSING TO GIVE THE REQUESTED INSTRUCTIONS AS TO CRIMINAL INTENT AS REQUESTED BY THE APPELLANT.

In his brief, the appellant places great reliance in the decision of the Supreme Court in *Morissette v. United States,* 342 U.S. 246, 249, 250 (1952). The factual situation in the *Morissette* case is so different from that in the case at bar as to be of little value. In that case the defendant had openly taken certain government property which he thought was abandoned. He was tried and convicted for "knowingly" converting government property in violation of Title 18 U.S.C. Section 641. The instructions of the trial court eliminated from jury consideration the questions of *mens rea.* Mr. Justice Jackson in the opinion of the court, describes the rulings of the trial court as follows:

> ". . . On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were cast-off and abandoned, that he did not intend to steal the property, and took it with no wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: '[H]e took it because he thought it was abandoned and he knew he was on government property. . . . That is no defense. . . . I don't think anybody can have the defense

> they thought the property was abandoned on another man's piece of property.' The court stated: 'I will not permit you to show this man thought it was abandoned. . . . I hold in this case that there is no question of abandoned property.' The court refused to submit or to allow counsel to argue to the jury whether Morissette acted with innocent intention. It charged: 'And I instruct you that if you believe the testimony of the government in this case, he intended to take it. . . . He had no right to take this property. . . . [A]nd it is no defense to claim that it was abandoned, because it was on private property. . . . And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. . . . The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.' Petitioner's counsel contended, 'But the taking must have been with a felonious intent.' The court ruled, however: 'That is presumed by his own act'."

The *Morissette* case is distinguishable from the case at bar for the following reasons: In the *Morissette* case the trial judge refused to instruct that criminal intent or *mens rea* was an ingredient of the crime in Title 18 U.S.C. Sec. 641; whereas, in this case the trial judge adequately instructed that criminal intent was an ingredient of the crime charged. In the *Moris-*

sette case, the trial judge for all intents and purposes, directed the jury to bring in a verdict of guilty; whereas, in the instant case the trial judge's instructions, viewed as a whole, adequately stated the law. In the *Morissette* case the trial judge refused to allow the defendant to submit evidence that the defendant acted with innocent intention or to allow that question to be argued to the jury. As is admitted in the appellant's brief and from the record before this Court, the trial judge allowed evidence to be produced by the appellant and other witnesses as to the intent of the defendant and also allowed the matter to be fully argued before the jury.

The *Morissette* case stands for the proposition that felonious intent is an ingredient of an offense under Title 18 U.S.C. Sec. 641. In that respect the Supreme Court read into this statutory offense the common law intent of larceny. The court in that case also condemned presumptive intent sometimes called general intent.

In this case the trial judge instructed as follows in pertinent part:

No. 5

> ". . . Third, that the defendant did knowingly convert to his own use the property or thing of value belonging to the United States. . . .
>
> . . . Fifth, that the defendant possessed criminal intent in performing the acts which he did, as defined later in this instructions.
>
> You are hereby instructed that the term 'knowingly converts' means that the defendant knew

that the property or thing of value which he converted for his own benefit and use belonged to another—in this case, the United States—and yet knowingly, through such conversion, deprived the Government of its use and benefit.

If the Government has proved each and all of the essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime charged in the indictment, but if the Government has failed to prove any of the essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should acquit the defendant."

No. 6

". . . The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt."

No. 7

"Criminal intent is a necessary ingredient of the crime charged in the indictment, and before a verdict of guilty may be rendered you must find from the evidence, beyond a reasonable doubt, that the defendant intended to commit the offense against the United States charged in the indictment."

"In this connection, you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate

acts. One who voluntarily and deliberately performs an act which, from our common experience, is known to produce a particular result, may be presumed to have anticipated and intended that result." (Record 38-40.)

This Court in the case of *Bateman v. United States,* 212 F. 2d 61, 70 (1954) stated:

"As often occurs counsel has singled out one instruction in claiming error without regard to the instructions considered as a whole. The instructions on intent, given by the Court, correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors. On this question the Court charged the jury that it was incumbent upon the Government to prove beyond a reasonable doubt 'that there was owing to the government more tax than was shown in the return made by the defendants during the taxable years charged; that the defendants knew that there was owing more income tax than shown by the return; and that they wilfully attempted to evade or defeat any part of such tax by filing or causing to be filed a false return.' The Court not only specifically charged that intent was an essential element of the offense, that is bad faith, but that good faith was a complete defense."

In Instruction No. 5 the trial court in this case instructed the jury that knowledge and intent were ingredients of the offenses charged. The court further stated in Instruction No. 5 that the jury had to be satisfied that each of the elements had to be proved beyond a reasonable doubt. In Instruction No. 6 the

trial court charged the jury that the defendant was presumed to be innocent and that the defendant could not be convicted unless the jury was convinced of his guilt beyond a reasonable doubt. In Instruction No. 7 the judge defined criminal intent and told the jury that the defendant could not be convicted unless the jury found from evidence beyond a reasonable doubt, that the defendant intended to commit the offense against the United States.

The appellant cites the case of *Bloch v. United States,* 221 F. 2d 786, 788, 789 (9th Cir. 1955) for the proposition that Instruction No. 7 given by the trial judge in this case, insofar as it relates to presumptive intent is fatal error. However, if the Instructions in this case are analyzed as a whole rather than piecemeal we will find that the Instruction on presumptive intent is not erroneous.

In the later case of *Legatos v. United States,* 222 F. 2d 678, 685 (9th Cir. 1955), this Court found the following Instruction not error when considered in the light of all of the Instructions:

> " 'The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.' "

The court further stated its rationale as follows:

> "It is our conclusion that, considered as a whole the Court's instructions on intent and wilfulness

> clearly and correctly stated the law and were not such as to mislead the jury. We conclude, therefore, that the present case is governed by Bateman v. United States, supra, and is distinguishable from Wardlaw v. United States, supra, and Bloch v. United States, supra, where the effect of the court's instructions considered as a whole was not discussed."

It is respectfully submitted that the instructions in the instant case, taken as a whole, clearly and correctly stated the law and were not such as to mislead the jury. This case is closer in its factual aspects to the *Legatos* and *Bateman* cases than the *Bloch* case.

It was not error for the trial judge to refuse to give the appellant's proposed Instructions Nos. 1, 4 and 5 for the reason that these instructions insofar as they correctly state the law, were amply covered by the court's Instructions Nos. 5, 6 and 7.

Since the court was adequately instructed as to the law in this case, the appellant's designations of error Nos. 13, 14 and 15 are without merit.

III. THE TRIAL COURT DID NOT ERR IN FINDING THAT ALBERT CLINE WAS NOT AN ACCOMPLICE AS A MATTER OF LAW. THE COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY THAT CLINE WAS AN ACCOMPLICE, THAT THE TESTIMONY OF AN ACCOMPLICE SHOULD BE VIEWED WITH DISTRUST, AND THAT THE APPELLANT COULD NOT BE CONVICTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

A. Cline was not an accomplice as a matter of law.

The witness Cline could not be tried for the identical crimes for which the appellant was being prosecuted. It is inconceivable that the witness Cline could have stolen his own services from the United States Air Force within the meaning of Title 18 U.S.C. Sec. 641. In any event, as is conceded by the appellant on page 39 of his brief, it was at most a disputed question of fact as to whether the witness Cline was a willing participant in the alleged conversion. It is well settled that the term "accomplice" does not include a person who has guilty knowledge, or is morally delinquent, or who was even an admitted participant in a related but distinct offense. The court in *State v. Durham,* 75 N.W. 1127, 1131 (Minn. 1898), stated:

> "The general test to determine whether a witness is or is not an accomplice is, could he himself have been indicted for the offense either as a principal or accessory."

In the case of *People v. Hrdlicka,* 176 N.E. 308, 313 (Ill. 1931), the court held that an election judge who saw the appellant alter ballots and certified the returns were correct when they were not, was not an accomplice, for purpose of corroboration.

The Illinois court defined an accomplice as follows at page 313:

> "An accomplice is defined as one who knowingly, voluntarily, and with common intent with the principal unites in the commission of the crime . . . the term accomplice cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was even an admitted participant in a related but distinct offense."

An examination of the authorities in this case define "accomplice" as one who could be indicted and punished for the crime with which the defendant is charged.

Judge Reed in *ex parte Jackson,* 6 Alaska 726, 730, 731 (1922) stated:

> "The great weight of authority is that an accomplice is one who aids and abets or encourages the crime of which the defendant is accused, and the usual test by which to determine whether one is an accomplice is whether or not he could be indicted and punished for the crime with which the defendant is charged, or as it is sometimes expressed, whether his participation in the crime was criminally corrupt."

This Court in the case of *Stephenson v. United States,* 14 Alaska 603 (1953) declined to depart from the test that said the defendant and the witness had to be both subject to prosecution for the same offense.

In the case at bar, the tests of determining who is an accomplice as set out in the *Jackson* and *Stephen-*

son cases are clearly not met. In the *Stephenson* case, the thief and defendant had entered into an agreement whereby the thief would steal and deliver to the defendant certain specified items.

The appellant has cited a number of cases which may on first glance tend to support his thesis that Cline was an accomplice. However, upon careful analysis of these cited cases it appears that they do not support in any way that thesis.

The case of *Egan v. United States,* 287 Fed. 958 (D.C. Cir. 1923), is cited by the appellant for the proposition that the giver of a bribe is an accomplice of the receiver. The appellee does not concede that this is a correct statement of the law in this jurisdiction in the light of the actual holding in *Stephenson, supra.* The *Egan* case did not involve corroboration but rather the cautionary instruction given in jurisdictions where the common law rule prevails permitting conviction on the uncorroborated testimony of accomplices. The *Egan* case is distinguishable on its facts from the case at bar on these grounds:

> (a) The giving of the bribe and the receiving of the bribe was essentially one transaction; whereas, the work done by Cline for Chappell during duty hours were different and distinct transactions. The giver of the bribe gave the bribe involved in that charge; whereas what Cline did did not involve a crime under Title 18 U.S.C. Sec. 641.

This Court in the *Stephenson* case, *supra,* declined to adopt the minority view in the *Egan* case wherein

it would have abandoned the test that an accomplice must be subject to conviction of the identical crime for which the appellant is being prosecuted. There is substantial authority stating that a bribe giver is not an accomplice of the receiver. See: *State v. Turnblow,* 99 Or. 270, 193 Pac. 485 (1921); *State v. Coffey,* 157 Or. 475, 72 P. 2d 35 (1937); *State v. Quinlan,* 41 N.W. 299 (Minn. 1889); *State v. Durham,* 75 N.W. 1127 (Minn. 1898); *State v. Wappenstein,* 121 Pac. 989 (Wash. 1912); *State v. Emmanuel,* 259 P. 2d 845 (Wash. 1953).

The appellant cites the case of *Lett v. United States,* 15 F. 2d 686 (8th Cir. 1926), where the court abandoned the identical offense test and held that the purchaser of narcotics from the defendant (seller) was an accomplice because she was guilty of an offense under the same statute. The soundness of the reasoning in the *Lett* case, *supra,* is doubted by the appellee because it would appear that the buyer of narcotics under the circumstances, would be a victim rather than an accomplice. In *People v. Kinsley,* 5 P. 2d 938, 942 (Cal. 1931), the court reached the opposite and more convincing conclusion that the purchaser of narcotics was not an accomplice of the seller on the grounds that the crimes were not identical when it stated:

> "Appellant contends that the complaining witness, Mrs. Longino was an accomplice under Section 1111 of the Penal Code, and that he could not be properly convicted on her uncorroborated testimony. The witness, Mrs. Longino, to whom the morphine was sold, was not an accomplice."

The burden of proving the witness Cline an accomplice is upon the party invoking the rule namely, the appellant. In this case the appellant failed to show by the evidence that Cline was an accomplice.

In the case of *State v. Akers,* 74 P. 2d 1138 (Mont. 1938), involving theft of a horse, the Supreme Court of Montana said that it was for the jury to determine whether two witnesses who had driven the stolen horse for a price for the defendant were accomplices. At page 1143 of its opinion, the court stated:

> "While it is not urged here, the question of whether Summers and Sherrill were themselves accomplices is decisive of whether their testimony was sufficient corroboration under the statute. The exact status of Summers and Sherrill in relation to this crime was one of fact, and it was within the province of the jury to determine, under appropriate instructions, whether these two witnesses were in fact accomplices."

In the case of *Ripley v. State,* 227 S.W. 2d 26 (Tenn. 1950), the Supreme Court of Tennessee held that where the facts were unclear and in dispute that the question of whether a witness was an accomplice was for the jury's determination. The court said at page 29 as follows:

> ["... We think whether or not one is an accomplice in a given case is not a question that is exclusively for the court to determine. By the great weight of authority, 'The question of who is an accomplice is one for the court when the facts as to the witness' participation are clear and undisputed, when such facts are disputed or susceptible

of different inferences, the question is one of fact for the jury'."]

In *Darden v. State,* 68 So. 550, 551 (Ala. 1915), the court stated as follows:

["The test of the competency of the witness Percy Smoke in this case is: If he was on trial for this offense, would the evidence tending to show his guilt sustain a verdict of guilty? *Bass v. State,* 37 Ala. 569.

The burden of proving the witness to be an accomplice is, of course, upon the party alleging it for the purpose of invoking the rule, namely, upon the defendant. 3 Wigmore on Ev. § 2060(c).

And in this case, if the defendant had offered any proof tending to show that the witness Smoke was capable of committing crime, the question as to whether he was or not an accomplice would have been for the jury. . . ."]

There is sufficient authority to support the proposition that whether a witness is an accomplice when the facts of criminal participation in the identical crime are in dispute, then it is for the jury. These cases generally stand for the proposition also that the mere fact that the witness has been indicted for the same crime does not in and of itself make the witness an accomplice. See *Snowden v. State,* 165 So. 410 (Ala. 1936); *Driggers v. United States,* 104 S.W. 1166 (Ind. Terr. 1907); reversed on other grounds 95 Pac. Rep. 612; *Smith v. Commonwealth,* 146 S.W. 4 (Ky. 1912); *Deaton v. Commonwealth,* 163 S.W. 204 (Ky. 1914); *Slusser v. State,* 232 S.W. 2d 727 (Tex. 950).

It is clear from the evidence that Cline could not have been convicted under Sec. 641, Title 18 U.S.C. If Cline were involved in the identical crime, the burden was on the appellant to present the evidence tending to show his criminal participation. This, the appellant failed to do.

Since Cline could not be convicted of the identical crime for which the appellant was charged, then it was not error to so instruct. It also follows that none of the other instructions were required since Cline was not an accomplice within the meaning of Section 66-13-59 ACLA 1949.

B. Even if this Court finds that Cline was an accomplice as a matter of law, or that whether Cline was an accomplice was a question of fact to be determined by the jury, there was abundant corroboration in the record outside Cline's testimony to make any error committed by failing to instruct harmless.

The appellant took the stand in his own behalf and admitted that Cline had worked for him even though he denied ever knowingly working Cline on government time. Other evidence was presented by a number of witnesses to corroborate the testimony of Cline in all respects. The question of sufficiency of corroboration has been resolved in a number of decisions. In almost all of these cases the corroboration was far less convincing than in the instant case. See: *People v. Nikolich,* 269 Pac. 721, 722 (Cal. 1928); *People v. Knoth,* 295 Pac. 277 (Cal. 1931); *People v. Allen,* 279 Pac. 349 (Cal. 1928); *People v. Wayne,* 264 P. 2d 547 (Cal. 1953); *State v. Vigil,* 260 P. 2d 539 (Utah 1953); *State v. Pointer,* 213 Pac. 621 (Or. 1923); *Bliss v.*

State, 287 Pac. 778 (Okla. 1930); *State v. Rasmussen,* 63 N.W. 2d 1, 34 (Minn. 1954); *State v. Moore,* 177 P. 2d 413, cert. den. 332 U.S. 763 (Or. 1947); *State v. Brown,* 231 Pac. 926 (Or. 1925); *State v. Brake,* 195 Pac. 583, 585 (Or. 1921); *State v. Rosser,* 91 P. 2d 295, 299 (Or. 1939).

This Court has refused to reverse a conviction on the failure to instruct on accomplice testimony where the court found substantial corroboration of the accomplice's testimony in the record. *Nordgren v. United States,* 181 F. 2d 718, 722 (9th Cir. 1950); *Christy v. United States* (9th Cir. No. 15970, Nov. 18, 1958, unreported at this date).

There was no evidence in the record indicating that the witnesses for the appellee, Wilson, Sanders and Houston, were accomplices of the appellant. Absent any showing whatsoever that they could have been convicted of the identical crime of which the appellant was charged, no instruction was warranted. Even if it was determined that the instruction was required in one form or the other, it was not error for the reasons stated above because there was ample corroboration of their testimony in the record. Therefore, the appellant's designations of errors Nos. 8, 9, 10 and 17 are without merit.

IV. THE VERDICTS AS TO VALUE WERE SUPPORTED BY SUFFICIENT EVIDENCE.

The appellant's designations of error Nos. 5 and 6 are without merit. Captain Woods testified that the

retail value of the furniture was $412.00 and its cost to the government was $252.94. The fact that the jury came in with a lower special verdict as to value did not prejudice any of the rights of the appellant. Moreover, there is no indication that the computation of the jury as to the value of the furniture involved in Count 5 of the indictment was the product of compromise. The conclusion of the jury in this regard was supported by the evidence (R. 712-713).

The prosecution introduced evidence as to the value of Cline's services. This evidence was sufficient to support the jury's special verdict. Cline testified fully as to his earnings during the three week period in which he was working for the appellant (R. 767-770).

In the case of *O'Malley v. United States,* 227 F. 2d 332, 335, 336 (1st Cir. 1955), Judge Magruder states as follows:

> ". . . 18 U.S.C. § 641 provides that whoever steals or knowingly converts to his own use or the use of another, or without authority sells or otherwise disposes of, anything of value belonging to the United States shall be fined not more than $10,000 or imprisoned not more than ten years, or both; 'but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.' The section then defines the word 'value' as meaning 'face, par, or market value, or cost price, either wholesale or retail, *whichever is greater.*' [Italics added.] It is pointed out by appellants that in Count 2, for example, the cost to the government of the manual chain hoist was alleged to have been in excess

of $100.00, though, according to the evidence, it was sold by defendant O'Malley for the sum of $45.00, which may perhaps have been its fair market value at the time of such sale. Appellants urge that to make the doing of an act punishable in the greater degree of larceny, depending upon the original cost of the article stolen rather than upon its value at the time, is repugnant to Amendment VIII of the Federal Constitution, which prohibits the imposition of 'excessive fines' or of 'cruel and unusual punishments,' because the severity of the penalty is greatly disproportionate to the offense charged.

"We regard this constitutional argument as far-fetched and frivolous. The Congress, in defining the crime of larceny of government property, is not obliged to perpetuate the details of the ancient common law distinction between grand and petit larceny. The prescription in § 641 of maximum limits to the amount of fine or imprisonment which the judge may at his discretion impose, depending upon the circumstances of the offense, is characteristic of most of the offenses defined in Title 18 of the U.S. Code, and certainly does not constitute cruel and unusual punishment. Section 641 would have been within the constitutional power of Congress even if it had not provided for a lower maximum penalty or fine for a lower maximum penalty of fine or imprisonment in case the 'value' of the property, as defined, does not exceed the sum of $100.00."

The verdict should not be disturbed. Moreover, there is no showing that the verdict as to value was obtained by compromise.

V. MISCELLANEOUS ERROR.

In addition to the errors discussed above, the appellant has designated as error assignments 1, 2, 3, 4, 7 and 18. Needless to say, the appellant has not deemed these alleged errors of sufficient importance to discuss them in his brief.

Assignments of error 1 through 4 are without merit because the defendant's convictions of Counts 1 and 5 are supported by the overwhelming weight of the evidence. Therefore, the motion for judgment of acquittal was properly denied. Assignment of error No. 7 which relates to the alleged error of the court in limiting cross-examination of several witnesses, is without merit and should not be considered by this Court because the appellant has not specified wherein the court erred.

CONCLUSION.

The errors complained of on this appeal are without merit. The trial court properly refused the appellant the right to see certain pretrial memoranda prepared by the prosecuting attorney as not being within the scope of the rule in the *Jencks* case. Any construction of the *Jencks* case which would allow a criminal defendant to obtain the work notes of the prosecutor would be highly reprehensible. The court adequately instructed the jury that the crime charged in the indictment required specific criminal intent. The instructions of the Judge taken as a whole, correctly stated the law. It was not error for the Judge to refuse to instruct that the witness Cline was an accom-

plice. The witness Cline could not have been convicted of the identical offense involved in Count I of the indictment against the appellant. Even if it was error for the court to refuse to instruct that Cline was an accomplice, that error would be harmless because the appellant's conviction as to Count I of the indictment was amply supported by the evidence. Finally, there is adequate evidence to support the verdict of the jury as to both Counts I and V as to value. Since there are no errors substantially affecting the rights of the appellant, the judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
March 24, 1959.

Respectfully submitted,

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